

These are the tentative rulings for civil law and motion matters set for Thursday, June 5, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, June 4, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. Telephone appearances through June 2014 will continue to be governed by the current Local Rules. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0060314 Portfolio Recovery Associates, LLC vs. Kubik, Toni

Plaintiff is advised that its notice of motion must comply with Local Rules by providing notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Plaintiff's motion to compel response to discovery, order for genuineness of documents and truth of matters asserted is denied without prejudice. Unless otherwise ordered or provided by law, all moving and supporting papers must be served and filed at least 16 court days prior to the scheduled hearing date. Code Civ. Proc. § 1005(b). Plaintiff's motion was filed on June 2, 2014, only three days prior to the scheduled hearing date.

2. M-CV-0060630 Law Offices of Allan R. Frumkin, Inc. vs. Miller, James Pitt

Plaintiff's motion for order compelling defendant James Pitt Miller to appear at deposition is granted. The parties are directed to meet and confer regarding a mutually convenient date for the deposition, which in no event shall take place later than June 27, 2014 unless requested by plaintiff.

Plaintiff's request for sanctions is denied. The notice of motion fails to set forth the statutory authority for the request. Code Civ. Proc. § 2023.040; Local Rule 20.2.4(E). Further, as plaintiff is representing itself in this action, no attorneys' fees have been incurred. Although plaintiff also requests costs of \$250, plaintiff sets forth no basis for this request.

3. S-CV-0028282 U.S. Bank, N.A. vs. Alizadeh, Abolghassem, et al

Motion to Set Aside Orders

Defendants' motion to set aside orders to compel production of documents and apportionment of fees is denied.

Defendants move to set aside two orders: (1) January 30, 2014 order granting plaintiff's motion for order apportioning fees for discovery referee and clarifying role of discovery referee; and (2) February 18, 2014 order of the discovery referee granting plaintiff's motion to compel production of documents. Defendants' motion is based on the mandatory provisions of Code of Civil Procedure section 473(b), based on an attorney affidavit of fault filed by defendant and defendants' attorney Paul Warner.

The code section cited by defendants refers to relief from "default entered by the clerk" or "resulting default judgment or dismissal". The statute does not apply here, where defendants seek relief from an order regarding payment to, and the role of the discovery referee, and a motion to compel. *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143; *Las Vegas Land and Development Co., LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1091.

Even if the statute were properly invoked here, the same result would obtain. Despite defendants' contention that their attorney never received notice of the January 30, 2014 motion, the proof of service attached to the motion shows that it was delivered by overnight delivery, and FedEx provided confirmation that the documents were signed for by "M. Alizaldehy" [sic] on January 9, 2014. Nor is there any support for Mr. Warner's assertion that he understood defendants as being precluded from filing an opposition to the motion to compel unless they paid their share of the discovery referee's fees. A briefing schedule on the motion sent to the parties by JAMS makes no mention of payment of fees being a prerequisite to filing an opposition. (Talbot decl., Exh. E.)

Defendants' motion is not in proper form, as defendants fail to attach a copy of the proposed pleading to be filed in opposition to either motion. Further, defendants' motion was not made within a reasonable time, as defendants delayed several months before seeking relief from the court.

For each of the foregoing reasons, defendants' motion is denied.

OSC re Contempt

Appearance is required on June 5, 2014 at 8:30 a.m. in Department 40 on the OSC re contempt (arraignment only).

4. S-CV-0030772 Spinal USA, LLC vs. Griffis, Lee

The parties' requests for judicial notice are denied.

Defendant Lee Griffis's demurrer to first amended complaint is overruled.

The first cause of action alleges breach of an oral contract of bailment, relating to provision by plaintiff of inventory which defendant agreed to hold until purchased by third party customers, or return was demanded by plaintiff. (FAC, ¶¶ 6, 7.) Defendant notes that these allegations contradict allegations made in the complaint that inventory was sent to defendant only after defendant procured orders from third party customers. (Complt., ¶ 22.) Nevertheless, it is not improper to permit an amended pleading which corrects previously erroneously stated facts. *Jackson v. Pacific Gas & Electric Co.* (1949) 95 Cal.App.2d 204, 209. Nor do such allegations contradict the terms of the written contract attached as Exhibit A to the complaint, which does not address terms relating to the handling of inventory. Accordingly, plaintiff's first cause of action for breach of contract is sufficiently pled.

Plaintiff's second cause of action for conversion and third cause of action for wrongful detention of personal property adequately allege wrongful conduct in that defendant allegedly refused to return the subject inventory belonging to plaintiff after plaintiff demanded return. Accordingly, both the second and third causes of action are sufficiently pled.

Defendant shall file and serve his answer to the first amended complaint by no later than June 20, 2014.

5. S-CV-0031148 Mazzoni, Nello, et al vs. Centex Real Estate Corp., et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard on June 5, 2014 at 8:30 a.m. in Department 42.

Centex Real Estate Corporation and Centex Homes' ("Centex's") request for judicial notice is granted.

Centex's Motion to Modify the Orders Granting the Motions for Determination of Good Faith Settlement Filed by J.R. Pierce and CDI is granted. The orders granting cross-defendant J.R. Pierce Plumbing Co., Inc. of Sacramento and Creative Design Interiors, Inc.'s motions for determination of good faith settlement, filed April 18, 2014, shall be modified to state as follows: "The settlement was entered into in good faith within the meaning of Code of Civil Procedure 877.6 and claims by joint tortfeasors not parties to the settlement based on equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault are barred."

The court apologizes for any inconvenience caused by signing the prior order.

6. S-CV-0032437 Tiskiy, Nadezhda, et al vs. Teuscher, Wade, et al

The motion for summary judgment is continued to June 10, 2014 at 8:30 a.m. in Department 40. The court finds good cause to permit the motion for summary judgment to be heard within 30 days of the scheduled trial date. The court notes that defendants have filed a notice of refusal to stipulate to the commissioner. However, as the commissioner has previously heard motions in this matter, defendants are deemed to have already stipulated to the commissioner for all matters other than trial per Local Rule 20.2(B). Defendants' notice of non-stipulation is untimely and ineffective.

7. S-CV-0033702 Patton, Sandy D. vs. Cummins, Inc., et al

Defendants are advised that their notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Motion to Compel Plaintiff to Provide Discovery Responses

Defendants' motion to compel plaintiff to provide discovery responses is granted. Plaintiff shall serve verified responses to defendants' form interrogatories (set one), special interrogatories (set one) and demand for production of documents (set one), without objections, by no later than June 27, 2014.

Defendants' request for sanctions is denied as the motion was unopposed. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

Motion for Order that Matters be Deemed Admitted

Defendants' motion for order that matters be deemed admitted is granted. Defendants' request for admissions, set one, are deemed admitted.

The court must award monetary sanctions against a party whose failure to serve timely responses to requests for admission necessitated the filing of a motion. Code Civ. Proc. § 2033.280(c). However, the court notes that defendants' request for sanctions is unreasonable on its face, seeks fees that are duplicative of the fees requested with respect to the motion to compel, seeks attorneys' fees that have not been incurred, including 12 hours of attorney compensation for travel to the courthouse when telephonic appearances are permitted, and seeks messenger fees of \$94.75 without any explanation for why such messenger fees were reasonably necessary.

Defendants are awarded sanctions from plaintiff in the amount of \$580.

8. S-CV-0033734 Douglas, Toby vs. Brune, Mark, et al

The motion for summary judgment is continued to June 17, 2014 at 8:30 a.m. in Department 40. The court apologizes for any inconvenience to the parties.

9. S-CV-0033966 Smith, Lawrence E. vs. Calif. Dept. of Corrections, et al

The demurrer to first amended complaint is continued to June 26, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones.

10. S-CV-0034093 Duerner, Gary D., et al vs. Bank of America, N.A., et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard on June 5, 2014 at 8:30 a.m. in Department 43.

Request for Judicial Notice

Defendants U.S. Bank, Wells Fargo Bank, and Mortgage Electronic Registration Systems, Inc.'s ("defendants'") request for judicial notice of the court records in Placer County Superior Court Case Nos. M-CV-0057974 and M-CV-0057116, and of defendants' demurrer filed in this action is granted. Evid. Code § 452(d)(1). With respect to defendants' demurrer, the court takes notice of the fact that it has been filed, but does not intend to rule on issues set forth in the demurrer for purposes of this motion, or to address arguments that are not set forth in the motion before the court.

Ruling on Motion

Defendants' motion for an order declaring plaintiffs vexatious litigants is granted in part. As set forth in the notice of motion, defendants seek an order declaring plaintiffs to be vexatious litigants as defined by Code of Civil Procedure section 391(b)(1), requiring plaintiffs to furnish a security pursuant to Code of Civil Procedure section 391.1, and prohibiting plaintiffs from filing new litigation *in pro per* pursuant to Code of Civil Procedure section 391.7. While defendants argue in their moving papers that the action should also be dismissed pursuant to Code of Civil Procedure section 391.1, this request will be denied as defendants did not request such relief in their notice of motion.

Defendants' request for an order that plaintiffs post a security pursuant to Code of Civil Procedure section 391.1 is denied. Section 391.1 requires a showing that plaintiff is a vexatious litigant, and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant.

Defendants satisfy the first requirement of establishing that plaintiffs are vexatious litigants. Code of Civil Procedure section 391(b)(a) defines a vexatious litigant as a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at

least two years without having been brought to trial or hearing.” “Litigation” is defined as “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” Code Civ. Proc. § 391(a).

Defendants identify five litigations commenced by plaintiffs in propria persona, which were finally determined adversely to them:

- Bankruptcy Case No. 09-24467, filed March 16, 2009; dismissed by motion of the bankruptcy trustee for unreasonable delay;
- Bankruptcy Adversary Proceeding Case No. 09-2664; filed October 13, 2009; dismissed by order of the court as moot following dismissal of Bankruptcy Case No. 09-24467;
- Bankruptcy Adversary Proceeding Case No. 10-02056; filed February 2, 2010; summary judgment granted in favor of defendants;
- Bankruptcy Case No. 12-40283; filed August 24, 2012; voluntarily dismissed by plaintiffs;
- Bankruptcy Adversary Proceeding Case No. 13-02012; filed January 9, 2013; defendant’s motion to dismiss granted.

Plaintiffs provide no legal support for their contention that bankruptcy proceedings do not constitute “litigations” within the meaning of Code of Civil Procedure section 391. Given the broad definition provided by the statute, the court agrees that each of the identified cases constitute litigations, and each were finally determined adversely to plaintiffs.

However, defendants fail to establish that there is not a reasonable probability that they will prevail in the litigation against the moving defendants. Defendants argue only that res judicata bars plaintiffs’ claims in this litigation, as the bankruptcy court previously determined that “U.S. Bank held the note and was entitled to foreclose.” The doctrine of res judicata or claim preclusion precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. *Vezina v. Continental Cas. Co.* (1977) 66 Cal.App.3d 665, 669. Res judicata is applicable only to the same causes of action between the same parties or their privies. *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.

Although U.S. Bank was a named defendant in the prior bankruptcy adversary proceeding, neither Wells Fargo Bank, N.A. nor Mortgage Electronic Registration Systems, Inc. (“MERS”) were named as defendants in the former action, and defendants offer no argument regarding whether these defendants were in privity with U.S. Bank. Accordingly, defendants do not establish that res judicata bars plaintiffs’ claims as against either Wells Fargo or MERS. Further, defendants fail to establish that the two actions involved identical causes of action. Notably, in the prior action, plaintiffs sought a declaration to quiet title to subject property, and rescission of a notice of default. The bankruptcy court noted that the request to rescind was moot, as the notice of default had already been rescinded, though summary judgment was

granted as to plaintiff's quiet title claim. In the instant action, plaintiffs seek compensatory damages, declaratory and injunctive relief, and defendants fail to establish that alleged harm suffered by plaintiffs is identical in both actions.

To the extent defendants request that the court examine its previously filed demurrer for additional theories to support the argument that there is not a reasonable probability that plaintiffs will prevail in this litigation, the court declines to rule on issues that have not been properly presented in this motion.

Nevertheless, defendants are entitled to the relief sought pursuant to Code of Civil Procedure section 391.7. Section 391.7 provides that the court may, upon motion of any party, "enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." As set forth above, the court has determined that plaintiffs constitute vexatious litigants pursuant to Code of Civil Procedure section 391(b)(1). Accordingly, a prefiling order shall be entered prohibiting plaintiffs from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Code Civ. Proc. § 391.7. The clerk is directed to provide a copy of the prefiling order to the California Judicial Council pursuant to Code of Civil Procedure section 391.7(f).

11. S-CV-0034230 Dokimos, Steven, et al vs. PNC Mortgage, et al

The demurrer to the complaint was dropped by the moving party.

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